

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD G. ANDERSON and DEPARTMENT OF THE AIR FORCE,
U.S. NAVAL STATION, Keflavik, Iceland

*Docket No. 02-1010; Submitted on the Record;
Issued September 13, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant had any disability after July 8, 1982, causally related to his employment-related low back condition.

In a prior appeal of this case,¹ the Board found that the weight of the medical evidence, as represented by the opinion of Dr. Robert L. Hausserman, a Board-certified orthopedic surgeon and impartial medical specialist, established that appellant had no employment-related disability after July 8, 1982.

In a subsequent appeal,² the Board found that a new conflict in medical opinion was created and it set aside the February 23, 1999 decision of the Office of Workers' Compensation Programs and remanded the case for referral to a referee medical specialist pursuant to 5 U.S.C. § 8123(a). The facts of this case, as set forth in the Board's prior decisions, are hereby incorporated by reference.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Kenneth H. Yuska, a Board-certified orthopedic surgeon. On September 20, 2001 Dr. Yuska related appellant's history and complaints. He reviewed imaging studies and described his findings on physical examination. After reviewing appellant's medical record, Dr. Yuska diagnosed a lumbar disc injury in 1963 with residual numbness and weakness in the left foot to a mild degree.³ He also diagnosed degenerative changes in the lumbar spine. Dr. Yuska noted that physical findings of restriction of movement and abnormalities of gait were not consistent with appellant's diagnosed conditions. Other diagnoses remained unclear.

¹ Docket No. 90-1285 (issued February 28, 1991).

² Docket No. 99-1753 (issued January 11, 2001).

³ The Office accepted appellant's August 6, 1963 employment injury for aggravation of a herniated disc at L5-S1 and for a laminectomy on November 25, 1963.

On the issue of whether appellant's current diagnoses were causally related to the work injury of August 6, 1963, Dr. Yuska replied as follows:

"No. In my opinion, the clinical diagnoses and his inability to work are not related to the work injury of August 6, 1963. Having treated many disc patients both operatively and nonoperatively, the patients are generally able to get on with at least partial work after a disc injury irrespective of the residuals in their foot. It should be due to specific neurologic damage and not to a generalized pain syndrome with restriction of movement of the whole body. This examinee has bizarre findings on his physical examination. Movement of his elbows causes back pain. Movement of his shoulders causes back pain. Straight leg raising is exceedingly limit[ed] at only 2 degrees in the supine position; yet, much better at 70 degrees in the seated position. These findings are not consistent with a diagnosis of disc problems or back problems causing his current disability.

"The neurologic deficit in the lower extremity is very modest, consistent with one-level disc disease and decreased nerve function at the L5 root on the left. This does not explain all of his symptoms.

"In my opinion, the unrelated psychosocial issues and possibly some other diseases have come into play, which are causing his inability to work."

Dr. Yuska reported that appellant had no continuing work-related disability after July 8, 1982 relative to the August 6, 1963 work injury. Although he had residual weakness in the left big toe and residual numbness in the left foot related to the August 6, 1963 incident, his condition was stable and, based on a review of the medical records, had not changed much for many years. "This is probably unchanged from 1963," remarked Dr. Yuska. "Similar symptoms were present in the evaluations from 1982. This is a static situation, in my opinion." Dr. Yuska continued:

"In my opinion, [appellant] is unchanged from July 8, 1982. He may have developed some arthritic symptoms in his back and some more stiffness, which is consistent with his age, but his neurologic deficit has not changed. In my opinion, this does not constitute a recurrence of disability, nor is the disability ceased. He simply had some damage to his one nerve in his big toe and he subsequently reached maximum medical improvement and has lived with this throughout this time. In my opinion, this did not constitute a disability from the standpoint of ability to earn a living. There are many patients who have substantially more neurologic deficit than this and are able to carry on jobs such as mechanics doing light or modified work. Some even are able to lift over 50 pounds repetitively. I find it inconsistent that this examinee should be out of work for over 30 years relative to this neurologic deficit."

* * *

"If it were not for the psychosocial factors and hence it were based on the disc disease alone, this man should have been able to return to work probably as early

as 1964. In my opinion, it is not the disc disease that is stopping him from working. There is not anything related to the grill falling on his back in the Keflavik, Iceland, that was preventing him from working. There was no evidence of fractures on the [magnetic resonance imaging] or [computerized tomography] scans. The disc disease was limited to one level and should be a workable situation.”

Dr. Yuska reported that appellant would never to be expected to resume full work in a capacity of truck mechanic or any other capacity that required medium or light work with bending or lifting or climbing or walking. “In my opinion, his restrictions are due to age, disc degeneration, possible Parkinson disease and possible unspecified psychological problems. The injury of 1963 is not a cause for his current restrictions.” Dr. Yuska reported that he had no recommendations for continued medical care relative to the incident of August 6, 1963.

In a decision dated January 25, 2002, the Office found that the weight of the medical evidence, as represented by the opinion of the referee medical specialist, established that appellant had no work-related disability after July 8, 1982, medically connected to the injury of August 6, 1963.

The Board finds that appellant had no disability after July 8, 1982 causally related to his employment-related low back condition.

A claimant seeking benefits under the Federal Employees’ Compensation Act⁴ has the burden of proof to establish the essential elements of his claim by the weight of the evidence,⁵ including that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.⁶

In 1991 the Board found that the weight of the medical evidence, as represented by the opinion of a referee medical specialist, established that appellant had no employment-related disability after July 8, 1982. He has the burden of proof, therefore, to establish that any disability after July 8, 1982 is causally related to his accepted employment injury.⁷ In 2001 the Board found that a new conflict in medical opinion had arisen on this issue.

Section 8123(a) of the Act provides in part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁸

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ See *Wentworth M. Murray*, 7 ECAB 570 (1955); *Maurice E. King*, 6 ECAB 35 (1953) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity).

⁸ 5 U.S.C. § 8123(a).

Pursuant to section 8123(a) and the Board's prior opinion, the Office referred appellant to Dr. Yuska, Board-certified orthopedic surgeon. The Office provided Dr. Yuska appellant's entire case record and a statement of accepted facts so he could base his opinion on a proper background. Dr. Yuska reviewed the evidence and his own examination of appellant and reported that while appellant had a very modest neurologic deficit (weakness in the left big toe and numbness in the left foot) residual to the August 6, 1963 incident, these residuals caused no disability for work after July 8, 1982. He explained that appellant's neurologic condition was demonstrated to be static for many years and had not changed since July 8, 1982. Further, bizarre findings on appellant's current physical examination were not consistent with a diagnosis of disc problems or back problems causing disability. Dr. Yuska explained that it was not appellant's disc disease that was not stopping him from working: the disc disease was limited to one level with no evidence of fractures on the imaging studies. Dr. Yuska had no recommendation for continued medical care relative to the incident of August 6, 1963.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to a referee medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

The Board finds that the September 20, 2001 opinion of Dr. Yuska is based on a proper factual background and is sufficiently well rationalized that it must be accorded special weight in resolving the conflict in this case. As the weight of the medical opinion evidence establishes that appellant had no disability after July 8, 1982 causally related to his accepted employment injury, appellant has not met his burden of proof to establish an entitlement to compensation benefits beyond that date.

⁹ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The January 25, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 13, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member